

**United States Department of Labor
Employees' Compensation Appeals Board**

JOSEPH ROMAN, Appellant

and

**U.S. POSTAL SERVICE, GENERAL POST
OFFICE, Buffalo, NY, Employer**

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**Docket No. 03-1883
Issued: January 8, 2004**

Appearances:
David W. Covino, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On July 21, 2003 appellant's attorney filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated June 26, 2003, which affirmed the termination of compensation benefits. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue on appeal is whether the Office properly terminated appellant's compensation benefits on April 20, 2002 on the grounds that he had no residuals or disability causally related to his January 10, 2000 employment injury.

FACTUAL HISTORY

This case has previously been before the Board on appeal. In a September 25, 2002 decision, the Board found that the Office properly denied appellant's request for back surgery on

March 14, 2002.¹ The facts and the circumstances of the case as set forth in the Board's prior decision are adopted herein by reference.

In a letter dated March 14, 2002, the Office proposed to terminate appellant's compensation benefits on the grounds that the weight of the medical evidence established that he was no longer disabled due to his January 10, 2000 lumbar strain injury. The Office allowed appellant 30 days to respond and appellant did not respond within that time period. By decision dated April 16, 2002, the Office terminated appellant's compensation benefits effective April 20, 2002 on the grounds that appellant had no continuing disability or medical residuals causally related to the January 10, 2000 employment injury.

Appellant, through his attorney, requested an oral hearing on May 30, 2002. By decision dated June 26, 2003, the hearing representative found that Dr. Thomas Pastore, a Board-certified orthopedic surgeon, was not an impartial medical specialist on the issue of appellant's continuing disability, but that his report was based on a proper factual background and contained sufficient medical rationale to establish that appellant was no longer disabled due to his accepted January 10, 2000 employment injury of lumbar strain.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.² After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.³ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁴ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁵

ANALYSIS

Appellant's attending physician, Dr. P. Jeffrey Lewis, a Board-certified neurosurgeon, completed a series of reports beginning August 21, 2000 finding that appellant was totally disabled and recommending surgery. Dr. Lewis found that appellant had disabling back pain with radiation of pain and paraesthesias throughout the left leg and foot due to lumbar stenosis at L3, L4 and L5 which increased with ambulation. He also noted that appellant described neurogenic claudication. Dr. Lewis found moderate stenosis at L4-5 and mild stenosis at L3-4

¹ Docket No. 02-1176 (issued September 25, 2002). Appellant sustained an injury on July 1, 1999 accepted for a lumbosacral strain. A magnetic resonance imaging (MRI) scan revealed spinal stenosis at L3-4 and L4-5.

² *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

³ *Id.*

⁴ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁵ *Id.*

with clear ligamentum flavum and facet joint hypertrophy demonstrated on appellant's MRI scan. Dr. Lewis's reports support appellant's continued disability for work diagnosing spinal stenosis with resulting back and radiating leg and foot pain. He also diagnosed neurogenic claudication, clear ligamentum flavum and facet joint hypertrophy as related to appellant's accepted employment injury. He found that appellant was totally disabled as a result of the diagnosed conditions.

Due to the disagreement between Dr. Lewis and the Office medical adviser on the issue of the need for surgery, the Office properly referred appellant to Dr. Pastore, a Board-certified orthopedic surgeon, to resolve a conflict of medical opinion evidence regarding the need for surgery. In his March 4, 2002 report, Dr. Pastore noted appellant's history of injury including his January 10, 2000 employment injury and an earlier back injury. On physical examination, Dr. Pastore found no obvious deformity of appellant's back, that appellant complained of pain on forward flexion, but that there was normal intersegmental motion and no muscle spasm and that appellant's gait was normal. He found that appellant had no difficulty moving about the examining room, getting on and off the examining table or removing shoes and socks. Dr. Pastore found negative straight leg raising bilaterally, full hip motion and a positive voluntary release sign when testing extensor hallucis longus function on the left side. He noted that appellant had decreased sensation to pinprick in the entire left leg from the toes to knee level with good peripheral pulses. Dr. Pastore diagnosed degenerative disc disease of the lumbar spine and stated:

“Basically, I feel that this man had some preexisting degenerative arthritis of his back, which may have been aggravated by the injury of January 10, 2000. However, this was two years ago and I do not feel that he has any residual symptoms at the time of my examination today resulting from the injury of January 10, 2000. Certainly some of his findings are of questionable credibility and do not follow any anatomic or physiologic pattern.”

Dr. Pastore found that appellant did not give the typical history of neuroclaudication and that ligamentum flavum hypertrophy and hypertrophy of the joints would be a degenerative process rather than resulting from the January 10, 2000 traumatic injury. He concluded that appellant's January 10, 2000 employment injury was a temporary aggravation of a preexisting condition from which appellant had recovered, that appellant had no residuals of this condition, that no further treatment was necessary and that appellant could return to his date-of-injury position with no restrictions. Dr. Pastore found that appellant had no disability and no medical residuals causally related to his accepted January 10, 2000 employment injury and provided the physical findings in support of his conclusion.

In this case, there is an unresolved disagreement between appellant's attending physician, Dr. Lewis, a Board-certified neurosurgeon, and the Office referral physician, Dr. Pastore, a

Board-certified orthopedic surgeon, on the issues of whether appellant could return to work and whether he required additional medical treatment,⁶ other than surgery.⁷ As the hearing representative properly noted, there was no conflict of medical evidence regarding appellant's disability for work at the time of the Office's February 2, 2002 referral to Dr. Pastore; therefore, Dr. Pastore is not the impartial medical specialist on the issues of disability for work and medical residuals other than the need for surgery as previously adjudicated by the Board. Therefore, his report is not entitled to special weight on these issues. Since both Dr. Lewis and Dr. Pastore examined appellant, provided histories of injury and medical history and provided physical findings in support of their divergent conclusions, there is an unresolved conflict of medical opinion evidence regarding appellant's ability to return to full duty and his diagnoses resulting from the accepted employment injury. Dr. Pastore concluded that appellant had sustained a temporary aggravation of preexisting degenerative disc disease from which he had recovered with no disability and no residuals. Dr. Lewis, on the other hand, diagnosed spinal stenosis, with resulting back and radiating leg and foot pain. He also diagnosed neurogenic claudication, clear ligamentum flavum and facet joint hypertrophy as related to appellant's accepted employment injury. He found that appellant was totally disabled as a result of the diagnosed conditions. As there is an unresolved conflict of the medical opinion evidence regarding the extent of appellant's disability and medical residuals, the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits due to an unresolved conflict of medical opinion evidence between appellant's attending physician, Dr. Lewis, a Board-certified neurosurgeon, and Dr. Pastore, a Board-certified orthopedic surgeon and Office referral physician.

⁶ 5 U.S.C. §§ 8101-8193, 8123(a). Section 8123(a) of the Federal Employees' Compensation Act, provides, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

⁷ As noted previously, Dr. Pastore was properly designated as an impartial medical specialist on the issue of whether appellant required back surgery and the Board found in its September 25, 2002 decision, that his report resolved this issue. Therefore, the issue of the need for back surgery is not before the Board on this appeal. 20 C.F.R. § 501.6(d).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 26, 2003 is hereby reversed.

Issued: January 8, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member